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IN THE

# Supreme Court of the United States

**October Term, 1967**

No. [redacted] 141

CARL I. COHEN,

*Petitioner,*

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## SUPPLEMENTAL APPENDIX FOR PETITIONER

KLEINMAN, GOLD & LANDSMAN
*Attorneys for Petitioner*
66 Court Street
Brooklyn 1, New York

*Of Counsel:*
ABRAHAM GLASSER
52 Eighth Avenue
New York, N. Y. 10014

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—OREGON 5-4540

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

*Petitioner,*

**Appendix SA, Petition for Certiorari to The Court of Appeals of The State of New York in No. 614, October Term, 1966**

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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KLEINMAN, GOLD & LANDSMAN
*Attorneys for Petitioner*
66 Court Street
Brooklyn 1, New York

*Of Counsel:*
EUGENE GOLD


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No. 814, October Term, 1968

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1966

No. 614

CARL I. COHEN,

*Petitioner,*

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK**

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KLEINMAN, GOLD & LANDSMAN
*Attorneys for Petitioner*
66 Court Street
Brooklyn 1, New York

*Of Counsel:*
EUGENE GOLD

32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

# Supreme Court of the United States

October Term, 1966

No.

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CARL I. COHEN,

*Petitioner,*

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, Carl I. Cohen, prays that a writ of certiorari issue to review the order or judgment entered in this case by the Court of Appeals of the State of New York on July 8, 1966, hereinafter described.

### Opinions Below

The Court of Appeals of the State of New York did not write an opinion; two Judges of that Court (Desmond, C. J., and Fuld, J.) dissented in an opinion which is printed in Appendix B hereto, *infra*, as part of the "memorandum" report of the decision of the Court of Appeals, reported in 18 N.Y. 2d 650, — N.Y.S. 2d —. The opinion of the Appellate Division, Second Department, Supreme Court of New York, is reported in 24 A. D. 2d 900, 264 N.Y.S. 2d 886, and is printed in Appendix C hereto, *infra*. The opinion of the Supreme Court of New York, Kings County (Rinaldi, J.), is reported in 42 Misc. 2d 403, 248 N.Y.S. 2d 339, and is printed in Appendix D hereto, *infra*.

## Jurisdiction

The judgment or order of the Court of Appeals of the State of New York sought to be reviewed was dated July 7, 1966. That judgment or order affirmed, after full appeal on the merits, an order of an intermediate appellate court of the State of New York, the Appellate Division of the Supreme Court, Second Department, entered November 29, 1965, which in turn had affirmed with modification an evidence-suppression order granted by the Supreme Court of the State of New York, Kings County (Rinaldi, J.) on motion of the within petitioner who had sought such suppression of evidence (pretrial) in a prosecution for abortion. The pretrial suppression order by Justice Rinaldi vacated an ex parte wiretap order and directed the suppression of evidence procured by such wiretap together with evidence secured by unlawful search and seizure. The above-mentioned appeals resulted in modification of Justice Rinaldi's suppression order by reversing the portion of that order which had vacated the ex parte wiretap order and had suppressed the wiretap evidence; the appeals affirmed the suppression of the search-obtained evidence.

Under the New York State statutory procedure for motion-to-suppress proceedings of the above-mentioned type (N.Y. Code Crim. Proc. §§ 813-c et seq.), the State (the People) is not permitted to pursue the State statutory avenue for review of an order of suppression (such as had here been granted by Justice Rinaldi) without first filing a formal statement asserting that the deprivation of the use as evidence of the items suppressed makes it impossible in law or effectively destroys any reasonable possibility in fact to carry forward the criminal prosecu-

tion involved to a conviction (*id.*, § 518-a). The State filed such a statement in this case as a condition of being permitted to appeal to the Appellate Division from Justice Rinaldi's order of suppression. We submit that, by reason of the statute last cited and the filing by the State of the statutorily required statement just mentioned, it is to be taken that under the law of the State of New York the suppression order of Justice Rinaldi was the equivalent of a final and not merely an interlocutory order in the within proceedings, i.e., Justice Rinaldi's suppression order, under the operation of the law and practice of the State of New York in the manner above-mentioned, was the legal or jurisdictional equivalent of an order dismissing the indictment or indictments involved.

In the appeal taken by the State to the Appellate Division, to review Justice Rinaldi's order of suppression, the partial modification ordered by the Appellate Division had the result of rendering the indictments no longer necessarily impossible to prosecute to a conviction. The petitioner herein then appealed to the Court of Appeals of the State of New York, which affirmed the order of the Appellate Division, i.e., under the judgment or order of the Court of Appeals it is likewise no longer necessarily impossible for the State to prosecute the indictments forward to a conviction.

It is thus true that the judgment or order of the Court of Appeals here sought to be reviewed does not finally dispose of the subject matter, i.e., it does not finally dispose of the criminal prosecution under the indictments involved. But it is believed that this is not the test of "finality" for the purpose of this Court's certiorari jur-

isdiction in the present instance. Justice Rinaldi's order of suppression did produce a result of finality in view of the New York legislation and practice previously referred to (Code Crim. Proc. §518-a), and it would not seem that the subsequent appellate modifications which revived a practical possibility of continuing the prosecution under the indictments can alter the legal or jurisdictional significance of the fact that petitioner did at one stage have what amounted to a final judgment in his favor (Justice Rinaldi's suppression order), and that now the highest State appellate court has rendered a final judgment depriving petitioner of the benefits of the lower Court's final judgment which, if it had not been modified on appeal, would have terminated the criminal prosecution.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Fourth Amendment (unreasonable search and seizure), the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process of law) of the Constitution of the United States, and under 47 U.S.C. §605; and since there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813(a)) on the ground of its being repugnant to the Constitution of the United States, and to 47 U.S.C. §605 as given supremacy by Article VI of the Constitution of the United States.*

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* Our above suggestions as to jurisdictional finality on the instant record make it appropriate to add the following: An earlier stage of this litigation (i.e., of the proceedings by petitioner Cohen seeking suppression of evidence obtained by wiretap and search) was before this Court in *Cohen v. New York*, 375 U.S. 985 (Oct. Term 1963, No. 640), cert. denied. In the latter proceeding we called attention to the suppression proceeding, then concurrently pending, which has now eventuated in the present petition for certiorari, and we noted the jurisdictional problems

## Questions Presented

1. Where State Courts in an abortion prosecution have voided a search of a physician's office on Fourth Amendment grounds and have ordered the product of the search suppressed for use as evidence in the abortion prosecution; and where the local police prior to the search had maintained at the same office premises a telephone wiretap authorized by ex parte Court order under permissive State wiretap legislation; and where the police claim to have lost or discarded important records taken in the search which would have disclosed which sources of evidence (names of female patients of the physician) for use at the abortion trial came from the voided search and which came from the wiretap; and where the State Court of first instance which conducted the hearing on the motion to suppress the product of the search and the wiretap has ordered suppression of both such products on the ground *inter alia* that the evidentiary sources obtained from the voided search and from the wiretap were inextricably interwoven or intermingled; and where the State appellate courts in reviewing the suppression order have not ruled on the latter issue of intermingling, have agreed that the search was bad, but have held that the wiretap was lawful—does vindication of the Fourth Amendment rights acknowledgedly violated by the *search* require suppression also of the intermingled *wiretap*-obtained evidence, lest otherwise, in the particular circumstances presented, the Fourth Amendment rights be indirectly but effectively prejudiced?

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which at that time remained unmatured but are now believed to be mature for consideration by this Court in the instant proceeding. See Pet. Cert., pp. 2-3, 5-19, *Cohen* v. *New York*, Oct. Term 1963, No. 640, cited *supra*.

2. Assuming that the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a) which allows what we may term "searches" in the form of wiretaps upon a showing of "reasonable grounds" is not in conflict with any Federal constitutional or statutory provision, and treating the "reasonable grounds" provision of the State statute as equivalent to Fourth Amendment "probable cause" (evidently so construed by the State Courts), were the police affidavits used to obtain the ex parte wiretap order in this case adequate by Fourth Amendment standards in view of failure to establish reliability of the informer, among other Fourth Amendment defects?

3. If the wiretap affidavits be deemed to have met the test of "probable cause", then, reaching the question of constitutional validity of the statute, is the New York permissive wiretap statute (N.Y. Code Crim. Proc. §813-a) unconstitutional under the Fourth Amendment as authorizing a "general search" or search for "mere evidence" of crime (including "future crime") and not solely for fruits or instrumentalities of crime?

4. Can any State statutorily permitted wiretapping be constitutional under the Fourth and Fifth Amendments and 47 U.S.C. §605?

5. Did the overall conduct of the police in investigating the alleged abortion activities of petitioner—which police conduct included an egregiously high-handed and admittedly unconstitutional search, massive wiretapping for which ex parte State judicial permission was obtained on the basis of information from basely discreditable and favor-seeking-motivated informers whose information was moreover almost all hearsay, loss and spoliation of essential

records seized in the unlawful search, manifestly unconvincing police testimony at the suppression hearing to the effect that the wiretap rather than the search produced the essential leads for the abortion prosecution, and brutally coerced subjection of a main female prosecution witness to compulsory gynecological examination in the immediate aftermath of her alleged abortion by petitioner as she was arrested on leaving petitioner's office (the lady in question moreover having denied she was aborted and the hospital report being negative for abortion)—fall below Fourth and Fourteenth Amendment standards for the investigation and prosecution of crime?

## Constitutional and Statutory Provisions Involved

The case involves Article VI (supremacy clause), and the Fourth (unreasonable search and seizure), Fifth (self-incrimination) and Fourteenth (due process of law) Amendments of the United States Constitution. It also involves §605 of the Federal Communications Act (U.S.C. Title 47). It also involves the following New York State statutes: Code Crim. Proc. §518-a, §§813-a, 813-c, 813-d and 813-e. These Federal and State statutory provisions are quoted in Appendix J hereto, *infra*.

## Statement of the Case and of How the Federal Questions are Presented

Petitioner, a licensed physician of the State of New York, was indicted for abortion (R. 7-20).* He moved in the Supreme Court of New York, Kings County, to suppress

* "R. " refers to the printed Record On Appeal in the Court below, nine extra copies of which are filed herewith.

the use as evidence of products of a search of his home and office conducted during the middle of the night of September 2-3, 1960, and the products of a telephone wiretap of his office conducted for some months prior thereto under the authority of an ex parte Court order issued pursuant to N.Y. Code Crim. Proc. §813-a (R. 21). After extensive hearings (R. 63-556), the motion to suppress was granted, on the grounds *inter alia* that the search violated the Fourth Amendment, the wiretap permissive order was based on affidavits which were inadequate under the "reasonable grounds" requirement of the statute, and the evidentiary products (especially the names of female patients of petitioner) of the search and the wiretap were so inextricably intermingled or interwoven that it was necessary to suppress the use of the testimony of all of the female complaining witnesses named in the indictments; in this last connection the Supreme Court, Kings County (Rinaldi, J.), also noted that the police had lost, misplaced and destroyed records obtained in the search which were indispensable for determining which evidentiary sources came from the search and which from the wiretap, and it strongly disparaged the probativeness of the police testimony on this subject (R. 563-571; Appendix D hereto, *infra*).

The New York State statutes permit appeal by the State (the People) from an order of suppression of the instant type if the State files with the Appellate Court a statement asserting that, if the State is deprived of the use of the suppressed evidence, the prosecution cannot be carried forward to a conviction (N.Y. Code Crim. Proc. §518-a). The State filed such a statement in this case as a condition of the right to appeal to the Appellate Division, Second Department, Supreme Court of New York.

The Appellate Division, in the appeal by the State from the order of suppression, approved the lower Court's (Rinaldi, J.) invalidation of the search; it disapproved Justice Rinaldi's determination that the wiretap affidavits were insufficient, but, be it noted, this ruling of the Appellate Division was stated in only conclusory words; it deleted Justice Rinaldi's order of restraint or suppression as to the use of the names of the females mentioned in the indictments, but it did so without (so far as appears) considering the issue of whether those names came from the wiretap, or from the search, or interminglingly from both the wiretap and the search; it did not reach the issue of loss or spoliation of documents by the police; it also did not reach the issue of the overall police conduct in relation to the search and the wiretap taken together; and it did not reach any constitutional issue of wiretapping, i.e., either as regards the constitutionality of Code Crim. Proc. §813-a in itself, or as to the constitutionality of *any* form of State legislation for permissive wiretapping by ex parte Court order (R. 576-579; Appendix C hereto, *infra*).

Petitioner appealed, by leave, to the Court of Appeals of the State of New York (R. 573-575), from the order of the Appellate Division (R. 576-577). The Court of Appeals affirmed the order of the Appellate Division without opinion (Appendices A and B hereto, *infra*). Judge Fuld of the Court of Appeals dissented, in the following memorandum in which Chief Judge Desmond concurred (Appendix B hereto, *infra*):

> "I adhere to the views I expressed in People v. Dinan (11 N Y 2d 350, 357)—that evidence should be excluded if obtained by interception of telephone communications in contravention of the Federal Commu-

nications Act and, accordingly, vote to reverse and to order a new trial."

The Federal questions were duly preserved by petitioner and, as seen from our recitals, *supra*, were necessarily passed upon or decided in each of the three State Courts below. The Federal Constitutional points urged by petitioner in the motion-to-suppress proceeding before the Supreme Court of New York, Kings County (Rinaldi, J.), are set forth in Appendix E hereto, *infra* (quoted from the "Summary of Defendant's Points" in the typewritten memorandum of law before the latter Court).

In the Appellate Division the within petitioner (as respondent or appellee in that appeal) urged the Federal Constitutional points which are set forth in Appendix F hereto, *infra* (taken from the printed "Respondent's Brief" in the Appellate Division).

The State (as appellant) urged in the Appellate Division the points set forth in Appendix G hereto, *infra* (quoted from the printed "Appellant's Brief" in the latter Court).

In petitioner's appeal to the Court of Appeals he urged the Federal Constitutional Points which are set forth in Appendix H hereto, *infra* (quoted from the printed "Appellant's Brief and Appendix" in the latter Court).

The State (as respondent or appellee) in the Court of Appeals urged the points which are set forth in Appendix I hereto, *infra* (quoted from the "Respondent's Brief" in the latter Court).

## Reasons for Granting the Writ

### I

All three of the Courts below were evidently in agreement that the search violated the Fourth Amendment. Since no guidance or expression was offered by the Appellate Division or by the Court of Appeals to deal with the problem of the express finding and ruling by the Supreme Court, Kings County, concerning the intermingled character of the evidentiary products of the search and the wiretap,* the modification on appeal which leaves the State free to use the evidence of the female complaining witnesses stands in this record not merely as a ruling by the State appellate courts below that the wiretap-obtained evidence may be used, but also it is susceptible of being applied (erroneously, we contend) as an effective ruling by the latter Courts that such wiretap evidence may be used irrespective of the consequences that this may work in the way of allowing use at the trial of concededly unconstitutionally obtained *search* evidence.

The exhaustive proceedings before the Supreme Court, Kings County, in the hearing on the motion to suppress, were so complete (R. 63-556) as to afford little if any realistic expectation that there will ever be judicially unraveled in this case the interweaving of the search-obtained evidence and evidentiary leads as distinct from those obtained through the wiretap.

This case presents, therefore, in an unusual (but likewise unusually compelling) way a problem as to the effec-

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* As noted, so far as appears the unconstitutional search was the source of the entirety of the evidentiary leads to the names of Dr. Cohen's female patients.

tive preservation of undisputedly applicable Fourth Amendment sanctions. By a process of amorphous absorption of the undisputedly unconstitutional search products into the allegedly legal wiretap products, the admittedly proper and necessary constitutional quarantine against the search products in this case is sure to be breached.

Nor is it to be thought that the present case may be rare or even unusual in these last mentioned respects. It is virtually standard operating procedure for police to follow up a wiretap or electronic eavesdrop with a search and seizure where prosecution is contemplated. The intriguing procedural device implicit in the not-too-coherent but impingingly predictable rulings of the State appellate courts in this case, a device whereby unconstitutional Fourth Amendment searches are to be "rehabilitated" by "constitutional" State wiretaps, should receive the attention of this Court, the present case being a suitable vehicle for this purpose through the granting of certiorari.

## II

The Supreme Court, Kings County (Rinaldi, J.), specified in an impressively detailed manner (*infra*) the defectiveness of the wiretap affidavits under the Fourth Amendment test of "probable cause" * (R. 564-568; Appendix D hereto, *infra*). The Appellate Division ruled otherwise, but without any explanation or statement of reasons (R. 576-579; Appendix C hereto, *infra*); and the Court of Ap-

* The "reasonable grounds" provision of *N.Y. Code Crim. Proc.* §813-a is undisputedly the equivalent of "probable cause," and it has been so treated in this litigation. See also *People* v. *Grossman*, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (S. Ct. Kings Co. 1965). Cf. *Draper* v. *United States*, 358 U.S. 307, 310 fn. 1.

peals likewise (writing no opinion) did not explain why it affirmed the order of the Appellate Division (Appendices A and B hereto, *infra*).

The ex parte wiretap application and supporting affidavits appear at R. 21-29. The wiretap order was issued on affidavits by Assistant District Attorney Kenneth J. McCabe and two informants, Alvin G. Rosen and Audrey Saltzman. Let us begin by summarizing Justice Rinaldi's detailed analysis of those affidavits (it being remembered, again, that the Appellate Division and the Court of Appeals in reversing Justice Rinaldi on this issue gave no reasons for so doing).

Justice Rinaldi noted (R. 568) that Rosen and Saltzman were under investigation in connection with certain forgery, burglary and arson charges which in no way involved Dr. Cohen; that in the course of the investigation Rosen, "in an obvious attempt to curry favor with the police", volunteered to them that Dr. Cohen was committing abortions; that Rosen's information (described, *infra*) used in the supporting affidavits for the wiretap order resulted in supporting affidavits "based to a great extent on hearsay twice removed and on events which had transpired a long time prior thereto"; that "There is also a serious question" as to the sufficiency of the previous police dealings with Rosen such as would justify the police in depending upon the reliability of his information; that the question of informer reliability is "of paramount importance" and facts must be brought to the attention of the Court to whom ex parte application was made to satisfy it of such reliability; that Rosen and Saltzman "were themselves deeply enmeshed" in a major criminal ring and

while they had accurately confessed their own crimes and those of their accomplices in which they had already been implicated, they had never previously informed the police as to any crimes in which they themselves were not implicated; that "the police had no criteria to judge their reliability concerning information as to this defendant" and "Vouching as to their reliability had no basis in fact"; that the authorities impose "strict standards of reliability of informers"; that although these authorities involve search and seizure situations, "the same standards, at the least, must be applied to wiretap orders"; and that "The Court cannot find anything in the original wiretap affidavits which meet [sic] the foregoing tests as to * * * 'reasonable grounds' and 'reputation for reliability' "

The above summarized factual findings of Mr. Justice Rinaldi are fully supported by the record. Thus, the affidavits in support of the wiretap order revealed the following:—Assistant District Attorney McCabe's affidavit (R. 23-25) contains all of the allegedly material information, the affidavits of the informers Rosen and Saltzman being merely conclusory confirmations of Mr. McCabe's affidavit (R. 26-29), and stating that the information given by each of the informers to the police was their own "experience" and from conversation Saltzman allegedly had with one Irma Wertheimer. The McCabe affidavit averred that it was made *upon information and belief* and upon the annexed affidavits of Rosen and Saltzman, and that the sources of the information and the grounds of the belief were those "annexed affidavits, *the records and files of his office and information supplied to deponent by the detec-*

*tive's squad attached to the office of the District Attorney, Kings County"* (Emphasis added).*

The "information" recited in the McCabe affidavit was that Irma Wertheimer in July or August of 1958, being pregnant, "obtained information" that a criminal abortion could be performed upon her by the within Dr. Cohen; that shortly thereafter she went to Dr. Cohen's office with her husband Milton Wertheimer and had an abortion done for $500; that in July or August of 1959 Irma Wertheimer, being again pregnant, this time from intercourse with her boyfriend Constantine Triges, she and Triges went to Dr. Cohen's office where they paid him $400. for performing an abortion; that again in October or November 1959 Irma and her boyfriend Triges went to Dr. Cohen's office where they paid him $400. for performing another abortion; that during the first week of February 1960 Audrey Saltzman, believing herself pregnant, consulted with her girlfriend Irma Wertheimer regarding Dr. Cohen, Audrey and Alvin G. Rosen went to Dr. Cohen's office, Rosen had $750. with him, Dr. Cohen examined Audrey and advised she was pregnant, he demanded $900. to perform an abortion, as Rosen only had $750. with him and as Dr. Cohen wanted the entire $900. they left his office with the intention of returning when they had the rest of the money, but thereafter Audrey's menstrual cycle came about naturally and they had no rea-

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* Our italicized emphasis in the text immediately above is with a view to our discussion *infra* of one of the prime flaws in the wiretap affidavits, namely, that Mr. McCabe himself got his "information and belief" from police officers, not directly from any informant; see also our discussion *infra* as to the lack of any showing in this record that any affiant, informer or even any police officer was personally examined by the Judge who issued the original wiretap order.

son to return. Mr. McCabe's affidavit, which was sworn to July 27, 1960, concluded that by reason of the aforesaid there was "reasonable cause to believe that evidence of the crime of criminal abortion may be obtained if telephone messages were to be intercepted" on Dr. Cohen's office telephone. R. 23-25.

No affidavit was obtained from Irma or Milton Wertheimer, and the affidavits do not contain one word that the Wertheimer information was verified by anyone (R. 25-29).

The police testimony in the hearing before Justice Rinaldi revealed that the hearsay character of the affidavits was even more attenuated than appeared from the affidavits themselves because the police evidently got their whole story from Rosen rather than from his girlfriend Miss Saltzman, so that all of the alleged police information about Miss Saltzman's friend Irma Wertheimer (from whom no affidavit was obtained) came to them by *triple* hearsay (R. 119-132, 151-162, 241-247).

Indeed, since Assistant District Attorney McCabe in turn got his information from an unspecified police or detective source, or for all that appears, from *a chain* of such sources, the case is one of *at least quadruple* hearsay. The situation thus presented involves a hearsay attenuation too egregious to be salvageable under even the liberalized treatment of *United States* v. *Ventresca*, 380 U.S. 102, where the Court re-examined the problem of hearsay communications as among Government officers in conducting a search or in applying for a search warrant.

It is evident from the above why Justice Rinaldi concluded that the affidavits were insufficient. The affidavits contain nothing concerning the reliability of Rosen and

Saltzman as informers concerning abortion or any other criminal activity—and the record in this proceeding is barren of any indication that any further information on this subject beyond the affidavits themselves was supplied to the Judge who granted the application for the ex parte wiretap order. The affidavits also show on their face that all of the alleged information concerning Irma Wertheimer was hearsay to Rosen and Saltzman and at least double hearsay to the police and the District Attorney. And as for the item in the McCabe affidavit about Rosen's and Saltzman's own alleged visit to Dr. Cohen's office, this would scarcely rank as "reasonable grounds" since all that allegedly occurred was a conversation about an abortion, but no abortion.

Besides all of this, the alleged happenings mentioned in the McCabe affidavit long antedated the wiretap application, which was made at the end of July 1960. The alleged Irma Wertheimer incidents were in the summer of 1958, the summer of 1959 and the fall of 1959, and the inconclusive alleged Saltzman-Rosen incident was six months prior to the wiretap application.

We pause to emphasize this last noted circumstance that the alleged "reasonable grounds" adduced in Mr. McCabe's affidavit were so remotely prior in time to the wiretap application. As seen, Mr. Justice Rinaldi remarked that the application was based "on events which had transpired a long time prior thereto" (R. 568). The full implications of the constitutional offensiveness of this sort of inordinate time lag in applications for warrants which are in the nature of search warrants, can perhaps be best

appreciated in connection with our discussion *infra* of the problem of a search for "evidence", as distinct from a search for property. But it is pertinent also at this juncture to say a few additional words on this subject of the time lag in the present case. It is fundamental, in the general law of search warrants, that this kind of stale allegations cannot support an application for a search warrant. Cf. the Federal decisions which deal with this staleness factor in connection with arrests and searches, e.g., *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3 1958), cert. denied 358 U.S. 880; *Dailey* v. *United States*, 261 F. 2d 870 (C.A. 5 1958), cert. denied 359 U.S. 969; *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2 1961); *Hobson* v. *United States*, 226 F. 2d 890 (C.A. 8 1955); *Wrightson* v. *United States*, 222 F. 2d 556 (C.A.D.C. 1955); see also the dissenting opinion by Judge Waterman, collecting the authorities, in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2 1960), reversed on other grounds 369 U.S. 121.

Necessarily presented on this record also is the familiar Fourth Amendment point—prominently stressed by the New York Court of Appeals itself in its recent decision in *People* v. *McCall*, 17 N.Y. 2d 152—that no showing was made (before Justice Rinaldi) that any affiant or any other person appeared for examination before the Judge who granted the original wiretap order. Thus there was, apparently no opportunity, by judicial means, as contemplated by *N.Y. Code Crim. Proc.* §813a (and by the Fourth Amendment), to test the factual foundations of this manifestly shaky (at best) wiretap application. The order allowing the wiretap (R. 21) referred only to the "annexed affidavits", not to any examination or personal appearance of anyone. Had there been any such examination or appear-

ance it would presumably have become part of the record basis of the wiretap order, as the Court below pointed out in *McCall, supra.*

On this record, how can it be said that the State showed before the Judge who signed the wiretap order, that the police were in possession of the constitutionally required quality of "reliable" information to justify them in averring "that there is reasonable ground to believe that evidence of crime [abortion] may be * * * obtained" by the desired wiretap? It hardly seems necessary to re-emphasize the exacting standards in regard to adequate affidavit demonstration of the "reliability of the informer" at the time of the application for the "warrant". E.g., *Draper* v. *United States,* 358 U.S. 307; *Jones* v. *United States,* 362 U.S. 257; *Henry* v. *United States,* 361 U.S. 98.

Under the rule of these controlling Federal cases it was obligatory for the State here to demonstrate in the original wiretap affidavits the "reputation for reliability" of Alvin Rosen and Audrey Saltzman, and to include in those affidavits "some factual information independently corroborative" of the Rosen-Saltzman information (*United States* v. *Ramirez,* 279 F. 2d 712, 715 (C.A. 2, 1960)). Justice Rinaldi correctly concluded that he "cannot find anything in the original wiretap affidavits which meets the foregoing tests."

Certiorari is justified, indeed required, to bring about in this case, on the high authority of this Court, a re-assertion of the standards of the Fourth Amendment "probable cause" for "search" affidavits. *A fortiori* those standards are needed in connection with the form of "search" which is connoted by the peculiar "search" activities under State permissive wiretap legislation, as is the case here.

III

If the wiretap affidavits in the present case be deemed to have met the test of "probable cause", there is then necessarily reached the question of the validity of the New York State permissive wiretap legislation (N.Y. Code Crim. Proc. §813-a).

But for the contrary conclusion of the Appellate Division and the Court of Appeals, it would have seemed unnecessary, in view of the utter insufficiency of the affidavits in point of their probative quality (hearsay and staleness) and their failure to establish reliability of informers, to discuss other legal insufficiencies of the affidavits. But as it is, there are additional points for discussion. Is the New York State eavesdrop statute (Code Crim. Proc. §813-a) unconstitutional as offending against the ban against "general searches," also termed "searches for mere evidence"? Applying such test of constitutionality to the facts of the case, do the affidavits show that what was contemplated was a search for "mere evidence"? Even if the statute is constitutional in allowing searches for "mere evidence", is there anything in the affidavits looking to discovery of "evidence" of any past-committed or currently-being-committed abortion as distinct from *future* crime?

There are two familiar broad categories of analytical disjunction in the general law of search and seizure which elucidate the above questions, namely, (1) the disjunction as between "past" *versus* "present" *versus* "future" crimes, and (2) the disjunction as between "fruits and instrumentalities" of crime *versus* "mere evidence" of crime. It is elementary that there can exist no "probable cause" to arrest or to search for mere "future" crimes,

and that the entire corpus of the law of "probable cause" does not go beyond "past" or "present" crimes. E.g., *Brinegar* v. *United States*, 338 U.S. 160, 175-176, where, in defining "probable cause", the Court spoke of knowledge and information "sufficient in themselves to warrant a man of reasonable caution in the belief that an offense *has been* or is *being* committed" (emphasis supplied).

In other words, it is of the very essence of the constitutional law of unreasonable search and seizure, as such would sensibly apply to wiretap "searches," that wiretapping may constitutionally be permitted (if at all) only upon a showing which meets the tests of "probable cause" that a crime has been committed or is being committed.

Even so, however, the problem above suggested continues unresolved, *viz.*, that in regard to any such showing of a past-committed crime it is impossible to see how a wiretap could produce anything except supposedly confirmatory "evidence" of such alleged commission of the past crime; and this in turn means not only that there would have to be a showing of a reasonably grounded expectation that such confirmatory evidence would be obtained by wiretapping, but also it means that the problem heads one directly into the extremely disturbing constitutional question above mentioned as to whether *any* search *for mere evidence* (as distinct from fruits and instrumentalities of a crime) may be permitted. See Chief Judge Desmond's separate opinion in the recent *McCall* decision, *supra*, where the Chief Judge said:

> "* * * And there is another unanswerable constitutional objection to wire tapping and to the use of wire tapped evidence. Before the Fourth Amend-

ment (see *Entick* v. *Carrington*, 1765, 19 Howell's State Trials 1029) it was the law, and it has always been the law under the Fourth Amendment (*Gouled* v. *United States*, 255 U.S. 298, 309; *Boyd* v. *United States, supra*) that even a search under a warrant is unlawful, 'if used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding,' and that no search is valid except for the seizure of specific property, not evidence. Wire tapping by its very nature can never be anything but a search for evidence. Our wire tapping statute (813-a Code Crim. Proc.) as well as Art. 1, Sec. 12 of the State Constitution specifically authorizes the tapping of telephones to obtain 'evidence of crime' and the very affidavits on which the wire tap orders in this case were granted allege that the wire tapping is to be done to obtain 'evidence of crime'. I cannot in conscience depart from the views which three of us expressed in dissent in *People* v. *Dinan*, 11 N.Y. 2d 357. All wiretapping violates both the Fourth and Fifth Amendments to the Federal Constitution."

The leading case which forbids a search for "mere evidence" is *Gouled* v. *United States*, 255 U.S. 298. See also the opinion of Mr. Justice Brennan, dissenting, in *Lopez* v. *United States*, 373 U.S. 427, where the authorities are collected and discussed.

If a search for "mere evidence" is unconstitutional, then it follows, for our case, that the provision in the eavesdrop statute (N.Y. Code Crime Proc. §813-a) permitting a wiretap upon "reasonable ground to believe that *evidence* of crime may thus be obtained" is unconstitutional if such

be construed to allow wiretapping for any purpose which would not be strictly analogous to a search for "fruits and instrumentalities" of the crime or crimes of the categories involved in the instant indictments.

Discussion of the problem of a "search for mere evidence" usually touches upon the Fifth Amendment (self-incrimination) as well as upon Fourth Amendment search and seizure. This was Chief Judge Desmond's conclusion in his separate opinion in *McCall*, quoted *supra*. The same unreasonable act of search which violates a citizen's right of privacy under the Fourth Amendment may and usually does simultaneously violate his privilege against self-incrimination under the Fifth Amendment.* *Boyd* v. *United States*, 116 U.S. 618; *Gouled* v. *United States*, 255 U.S. 298. See also, again, Mr. Justice Brennan's dissent in *Lopez* v. *United States*, 373 U.S. 427, bringing the discussion of this theme down to more recent date, and noting that the theme had been reaverred in *Mapp* v. *Ohio*, 367 U.S. 643.

It needs no extended argument to show that it is above all in the area of telephone wiretapping and other electronic eavesdropping that this interplay between unreasonable invasion of individual privacy and breach of the privilege against self-incrimination tends naturally to achieve its most vicious and intense form.

And this last, in turn, brings us finally to what is perhaps the profoundest constitutional infirmity in any system of court-permitted wiretapping or electronic eavesdropping.

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* *Malloy* v. *Hogan*, 378 U.S. 1, has made the law of Fifth Amendment self-incrimination applicable to the States.

We refer to the "general search" character which must inevitably attach to *any* act or situation of electronic eavesdropping. Unlike a search under a search warrant where the things to be seized are explicitly described (as required by the Constitution), the eavesdropping electronic device conveys to the recording instrument or to the human monitor-auditor everything that is said on the eavesdropped telephone or in the eavesdropped room space; plainly this amounts to a "general search" in the constitutionally forbidden sense.

Applying the above-described "mere evidence" tests to the within affidavits, we find that the Rosen-Saltzman information pertained to three alleged acts of abortion on Irma Wertheimer (all hearsay, as noted) and one inconclusive abortion interview, all had in the remote past. How could a *post-factum* wiretap of Dr. Cohen's telephone lead to "evidence" of such supposed past-committed abortion? This hoped-for wiretap result could come about only if the informer-affiants swore that he, or she (or both of them), were expecting to be in telephone communication with Dr. Cohen or his office in connection with some aftermath developments relating to some alleged past-committed abortion. No such indispensable averment was made in the papers filed with the application for the ex parte wiretap order.

It is indisputable then, again, that no affidavit showing was here made to justify the conclusion that "evidence" of alleged past-committed or present acts of abortion would be obtained. And a mere showing of a supposed past-committed abortion, especially abortions that are remote in relation to the time of application for a wire-tap order, would not in itself constitutionally justify the conclusion

that "evidence" of such past, or present, much less *future*, abortion activity would be turned up by a wiretap.*

## IV

The dissenting opinion in this case written by Judge Fuld of the Court of Appeals, concurred in by Chief Judge Desmond, favored a disposition on the basis of outright constitutional invalidation of all State wiretapping in obedience to §605 of the Federal Communications Act (47 U.S.C.). In view of this Court's own continuing alertness to the problem of the conflict between cases such as *People* v. *Dinan*, 11 N.Y. 2d 350 and *Benanti* v. *United States*, 355 U.S. 96—see also the granting of certiorari in *Osborn* v. *United States*, 382 U.S. 1023, 15 L. Ed. 2d 538—we shall refrain from burdening the Court with further argument in support of the suggestion that this case affords a proper occasion for re-examining the Federal constitutionality of State wiretapping under the tests of the Fourth Amendment and of §605 of the Communications Act (supremacy clause).

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* We respectfully suggest that *Gouled* v. *United States*, 255 U.S. 298, the leading authority on the "mere evidence" issue, is still the law, notwithstanding the scholarly ratiocinations in the recent New Jersey and California decisions—*State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185; *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108—which came to this Court's attention in *Schmerber* v. *California*, —— U.S. ——, 16 L. Ed. 2d 908, 918 fn. 10, and which doubtless also were before Chief Judge Desmond and Judge Fuld (the dissenting Judges in the Court below in the instant case) when they dissented in another case decided on the same day as the instant case, *People* v. *Berger*, 18 N.Y. 2d 638, 640, involving the room "bugging" type of electronic eavesdropping (we are advised that the latter *Berger* case is about to be presented to this Court by petition for certiorari).

## V

The judgment below should be reviewed in several other aspects relating to both the wiretapping and the search, i.e., viewing the overall conduct of the police in this case in constitutional terms, the conduct of the police officers fell far below the Fourth Amendment and due process standards established by this Court under the test of "the total atmosphere of the case." *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (Frankfurter, J., dissenting). See also *Rios* v. *United States*, 364 U.S. 253, 255 ("a particular evaluation of the conduct of the officers involved").

The Court customarily examines the record facts in search-and-seizure cases in this comprehensive manner. *E.g., Henry* v. *United States*, 361 U.S. 98; *Jones* v. *United States*, 362 U.S. 257; *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344.

Let us note the several ways in which the conduct of the police officers in this case violated the above standards:

### Spoliation of Evidence and Improper Keeping of Records

(1) Perhaps the most notable instance in the epidemic of "loss", "misplacement" or destruction of documentary evidence on the part of the police in this case is that of Dr. Cohen's office desk diary calendar. Detective Toolan, describing the search activities at Dr. Cohen's office on the night of September 2-3, 1960 said that Policewoman O'Meara examined the calendar or diary on Dr. Cohen's desk and that she "found a name that meant something to her from her investigation up to that point, and she took that with her" (R. 117); also that "during the course of

the entire time that we were in the doctor's office, Gloria O'Meara was behind the desk and she was looking through patients' cards and through that calendar diary that I referred to" (R. 118). Chief Policewoman Melchionne said "I have heard that they did take a diary and that same has been unavailable at this point", "misplaced" (R. 171). Toolan also said that he does not know where the calendar diary is now (R. 148). Policewoman Munroe testified that Miss O'Meara told her she had looked at the calendar diary in Dr. Cohen's office during the search (R. 351).

Miss O'Meara herself stated that this calendar had been missing since sometime in 1961 (R. 393), she had taken it to Assistant District Attorney Panzarella (R. 395), after that she had seen it around for several months but she had since searched for it and could not find it (R. 395-396).

The People attempted, through the testimony of Miss O'Meara, to "rehabilitate" this missing calendar or diary by low-quality secondary "evidence" of Miss O'Meara's verbally stated "recollections" of the contents of the diary and by her alleged notes (as to which see further *infra*), to all of which a defense objection was sustained (R. 393-396). The admission by Miss O'Meara that the name of at least one complainant was found in the diary highlights its importance and the undoubted use of the diary in the investigation of Dr. Cohen after his arrest which led to the indictments herein. As a matter of fact, the District Attorney offered to concede that all of the police efforts, including the wiretapping, led to only one complainant, Esther Richards (R. 337-338). Since the diary was the only record taken from the defendant's office despite the examination of the patients' index cards as well, the infer-

ence from this theory of the District Attorney is overpowering that the diary was not only useful to the police but also, that the diary supplied the leads to the other complainants. Furthermore, Miss O'Meara destroyed relevant notes relating to her examination of the diary and the patients' index cards (R. 487, 489, 495-496).

In *Campbell* v. *United States*, 373 U.S. 487, and in the earlier decision in the same case in 365 U.S. 85, the Court indicated that in a proper case attention must be given to the question of what sanctions would be appropriate against the Government if it developed that "Jencks Act" (18 U.S.C. §3500) notes which were producible had been destroyed and no copy had survived. The Court also intimated that the sanctions in such a situation would be those under sub-section "d" of the Jencks Act, which provides, *inter alia*, that "The Court shall strike from the record the testimony of the witness" as to whom a producible statement is not delivered to the defendant. The *Campbell* cases, *supra*, have even left open the question of applying such sanctions against the Government where the destruction of the document involved may have been done in good faith. As noted by Circuit Judge Aldrich in his concurring opinion in *Campbell* v. *United States*, 303 F. 2d 747, 751 (C.A. 1 1962), " • • • the Supreme Court indicated the possibility of consequences unfavorable to the Government even if the destruction were innocent." The Courts of New York State have adopted the "Jencks" policy (*People* v. *Rosario*, 9 N.Y. 2d 286; *People* v. *Agron*, 10 N.Y. 2d 130), but they have not applied that policy here.

The New York Courts also recognize the need to afford some appropriate remedy to a party whose property seized

in an illegal search has been destroyed. *Metallic Flowers* v. *City of New York*, 4 A.D. 2d 292, 164 N.Y.S. 2d 227, 234 (1st Dept. 1957), mentioning as among the available remedies replevin and an action for damages. Obviously these latter suggested remedies were not adequate in our case. See also *People* v. *Strollo*, 191 N.Y. 42 (1908); *People* v. *Bell*, 21 A.D. 2d 660 (1964); *People* v. *Genova*, 15 A.D. 2d 44 (1961), where the loss of trial exhibits by the People which are essential for appellate review requires reversal of a conviction and dismissal of the charges against the defendant. How much more aggrieving is the loss of essential documentary items *before trial!*

Further analogous light is shed on the instant situation by the familiar authorities which require the vitiating of a conviction in a criminal case when evidence has been suppressed by the prosecution. *E.g.*, *Brady* v. *Maryland*, 373 U.S. 83.

That the precise issue here presented in regard to the loss or destruction of petitioner's office calendar or diary does not appear to have arisen in any previous proceeding for suppression of illegally seized evidence, should not result in depriving petitioner of a remedy. The granting of our motion to suppress by Justice Rinaldi was justified on the ground, without more, of the People's negligent or otherwise improper conduct in losing Dr. Cohen's office calendar or diary. Such was entirely in keeping with the spirit of the Fourth Amendment tests above mentioned whereby the Courts are called upon to consider "the total atmosphere of the case" and to make a "particularized evaluation of the conduct of the officers involved." The unavailability of the calendar or diary and the destruction

of notes relating to the other facets of the search (i.e., patients' index cards), when taken together with the numerous and important other instances of unfairness and violation of due process on the part of the People's officers in this case, required the granting of our motion to suppress as a means of vindicating the Fourth Amendment standards just mentioned.

(2) Rivalling the "lost" diary item is Policewoman O'Meara's astounding "dot-dash" testimony (i.e., coded notes containing "dot" and "dash" symbols) (R. 477-480), and the manner in which she prepared her notes of the search and the alleged prior surveillance of the defendant's office (R. 845 et seq.). In this branch of the case, the witness' tactical preoccupation seemed to be, at the moment, not to shield what had happened prior to September 2, 1960,* but to shield what happened on and after those days. Miss O'Meara's "dots" were supposed to indicate that a name on her pre-search list was found on a patient's index card or in the diary in defendant's office; a "dash" was supposed to indicate that the particular name on the pre-search list did not appear on such an index card or in the diary (R. 478). What is interesting, therefore, is that in only one instance covered by the questioning on this subject did Miss O'Meara's supposed system of dots and dashes produce an unequivocal or even a coherent conclusion, and in that single instance the name (Basile) is not important for this case (R. 479). Thus, of the names concerning which she testified on her pre-search list, the name Albertino had a dash and an allegedly accidental or inadvertent dot that "looked" to the witness like merely the dotting of the letter "i" (R. 478); the names Holman, Pack and Richards each had both a dot and a dash, of which the witness said (sud-

* The date of the search.

denly amending the supposed meaning of her supposed code) that this meant no index card was found for these names on the pre-search list (R. 478-479).

It is plain to see what this testimony of Miss O'Meara concerning the "dot-and-dash" code and the notes of surveillance was designed to accomplish. Its purpose was to suggest that no information which led to the within indictments was obtained from the patients' index cards or the "lost" diary during the search of September 2-3, 1960.

(3) Other instances of destruction, loss, misplacement or failure to keep records relevant to the issues of the motion to suppress are: (a) Policewoman O'Meara's admitted, unexplained and unexcused destruction of several pages from her memorandum book relating to the crucial happenings of September 2, 1960 (R. 485-489); (b) Miss O'Meara's similar destruction or misplacement of other contemporaneous notes concerning the events of the afternoon of September 2, 1960 which had allegedly been used by her to write up her memorandum book of a subsequent date (R. 489-491); (c) Miss O'Meara's similar admitted destruction of an unknown number of other relevant notes and papers (R. 508-509); (d) the admitted destruction by Detective Malapero of the paper on which he allegedly wrote down the license plate number of the Esther Richards automobile on September 2, 1960 (R. 223-225); (e) the failure of Detectives Toolan and Malapero to have kept any notes or memoranda at all, under direct orders of the District Attorney's office that such omission to keep records should be deliberately done in this case despite police regulations which require the keeping of such notes and memoranda (R. 111, 132-133, 165, 223-225); (f) the admitted

failure of Chief Policewoman Melchionne to make or keep any notes or memoranda concerning this investigation or, especially, concerning her vital conversations with Detective Toolan, despite her testimony that she had not been instructed by the District Attorney not to keep notes or memoranda about this case (R. 178, 211-212)*; (g) the failure of Policewoman Munroe to make or keep any notes or memoranda except those consisting of her typewritten transcripts and lists in regard to the wiretap, despite the testimony of Mrs. Melchionne that her policewomen had not been instructed not to keep notes or memoranda about this case and her testimony that her policewomen did keep their own notes and that she assumes they still have them (R. 178-179, 291, 293-294); (h) the absence from Miss O'Meara's allegedly very complete notes concerning the arrest, of any mention of the defendant's alleged invitation to the police to search his office (R. 498-500).

It is remarkable, in fact uncanny, how the instances throughout this case in which records are missing or claimedly were never made, as well as the instances in which the police notes or the police memories are deficient or flawed and the police veracity questionable, happened to touch the most sensitive areas of the case, *viz.*, the areas which would reveal illegal wiretap-obtained leads or illegal search-obtained leads, and would refute claimed legal evidentiary leads. The police reports which tended to be most "available" were those relating to alleged "surveillance" activities, and those least available related to the wiretap and the

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* Note the inconsistency as between the Toolan-Malapero testimony and the Melchionne testimony concerning alleged instructions from the District Attorney as to the keeping of notes and memoranda.

search. Most striking, of course, was, again, the marvelous condition of the notes and records of Miss O'Meara, which were helpfully "complete" on points desired by the prosecution and "missing" or incomprehensibly unclear on points desired by the defense.

The combination of all of the above improprieties, deficiencies and official neglects on the part of the People's officers in this case is an important factor, we submit, to be considered in applying the tests of "the total atmosphere of the case" in regard to Fourth Amendment reasonableness (*Rabinowitz, supra*), and of "a particularized evaluation of the conduct of the officers involved" (*Rios, supra*).

**The Extraordinary Conduct of the Police In Extracting Alleged Admissions From The Complainant Esther Richards.**

In point of sheer luridness in the "total atmosphere of the case," if not of constitutionally prejudicial immediacy and directness of impact upon the petitioner Dr. Cohen himself, the following is perhaps the single most climactic item in this case:

Policewoman Munroe testified that she and Officer Toolan "intercepted" Esther Richards in an automobile on a street in Brooklyn on September 2, 1960, that this woman was subjected to repeated and prolonged interrogation while thus held in police custody, that she was taken to Kings County Hospital, *after her denial that she had been aborted*, and there subjected to a gynecological examination which the hospital doctor found to be *negative for abortion* (R. 278, 282, 327-331), that she was thereafter further interrogated, and was finally taken to the District

Attorney's office for still more interrogation, all of which is alleged to have culminated, after further alleged denials by her, in an admission of an abortion committed by the petitioner (R. 328-330).*

Unless Esther Richards consented to these phenomenal impositions by the police officers—there being nothing in the record to support any such suggestion of consent or waiver (indeed, Miss Richards for a long time denied she was aborted)—it is beyond any need for argument or citation of authority that she was subjected to unlawful arrest and to a barbarously unconstitutional search of her person in the most odiously intimate form imaginable. Cf. *Rochin* v. *California*, 342 U.S. 165, annotated in 96 L. ed. 194 (*"Physical Examination or Exhibition of, or Tests upon, a Suspect or Accused, as Violating Rights Guaranteed by Federal Constitution"*). Esther Richards herself, then, in a proper proceeding would undoubtedly be entitled to suppression of any alleged admission thus extracted from her. It follows also, therefore, incidentally, that the alleged evidence thus secured from Esther Richards was "illegal" in the literal and immediate sense of §249 of New York's own Code of Criminal Procedure ("The Grand Jury can receive none but legal evidence"). *Indeed, by virtue of this latter New York State Statute, the petitioner herein had literal "standing" to object to the Esther Richards item* (and he so urged in the courts below—e.g., "Appellant's Brief" in the Court of Appeals, p. 73).

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* We may note here that Miss Munroe had no notes of her alleged conversations with Esther Richards (R. 331), this being one more instance of the seemingly convenient unavailability of police notes and memoranda in this case.

In these circumstances, we submit that the usual limitations of "standing" to object to the use of evidence illegally seized from another person (*Jones* v. *United States*, 362 U.S. 257) do not apply, that the petitioner herein had such "standing" to move to suppress the alleged Esther Richards admission, whether or not such alleged admissions was introduced in evidence before the Grand Jury, and that in any event the facts should be taken into account in evaluating the "total atmosphere of the case".

The wrong of the police barbarity here involved cries out for judicial redress of the derivative wrong done to the present petitioner. The issue is one that goes beyond the law of search-and-seizure; it is an issue of constitutional due process because it involves police "conduct that shocks the conscience" and brings into operation the principle "that convictions cannot be brought about by methods that offend 'a sense of justice.'" *Rochin* v. *California, supra,* at 342 U.S. 172, 173.

In *Wong Sun* v. *United States,* 371 U.S. 471, the Court disapproved the use against one person of inculpatory admissions by another person where the latter admissions were obtained in violation of the Fourth Amendment. This ruling in *Wong Sun* is analogously applicable here.

We respectfully submit that the Esther Richards "search" episode impurified so fatally the "total atmosphere of the case" and required so unfavorabble an "evaluation of the conduct of the officers involved" as to have justified on this ground alone the granting of the within motion to suppress in its entirety in order to vindicate the requirements of Fourth Amendment reasonableness.

**Further Remarks As To The Relationship Between The Wiretap And The Search.**

As noted, the Appellate Courts below did not rule on any of the above described issues as to the overall police conduct, the spoliation or loss of documents and reports, the police brutality towards Esther Richards, or as to any of the grave problems concerning the integral relationship between the wiretap and the search.

It is impossible to see how the Appellate rulings below that the testimony of the females named in the indictment is usable at the trial, can be urged as meaning that the Appellate Courts below "held" that the police got the names of those women from the wiretap rather than from the search. The Courts below did not have before them the wiretap, or any stenographic transcripts thereof, or Dr. Cohen's "lost" diary; and, as seen, Justice Rinaldi found that the names came either from the search or the wiretap and search together.

The Appellate rulings below also present these further anomalies: How could the arrest on September 2-3 be invalid (as the Appellate Division, affirmed without opinion by the Court of Appeals, held it was) if the antecedent wiretaps were valid (as the Appellate Division, again affirmed by the Court of Appeals, also held), i.e., how could the arrest be invalid since it was undisputably based on the alleged Esther Richards happening, and that episode was unquestionably generated by the wiretap which the Appellate Courts below have held valid? And how, furthermore, could the Appellate Division (and the Court of Appeals) approve the order for return of the property seized at the time of arrest in petitioner's home if the ar-

rest was thus generated by wiretap information which, again, the Appellate Division (and the Court of Appeals) found to be legally obtained?

These peculiarities in the structure of the Appellate rulings below require at the very least that—in the event that this Court too should decline to undertake review of the constitutionality of the wiretaps or should uphold their constitutionality—that certiorari should be granted to direct that the matter be remanded for further proceedings to make definitive factual findings as to whether the names of the females came from the search or the wiretap.

## CONCLUSION

**It is respectfully submitted that this petition for a writ of certiorari should be granted.**

Respectfully submitted,

KLEINMAN, GOLD & LANDSMAN
*Attorneys for Petitioner*
*Carl I. Cohen*

EUGENE GOLD
*Of Counsel*

[Appendices follow]